

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP521
STATE OF WISCONSIN**

Cir. Ct. No. 2011CV3267

**IN COURT OF APPEALS
DISTRICT II**

WATERTRONICS LLC,

PLAINTIFF-APPELLANT,

V.

CONTROL TECHNIQUES AMERICAS LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This case arises from a breach of warranty action commenced over allegedly defective motor control drives. The purchasers of the drives, Watertronics, LLC, appeals from a judgment entered in favor of the seller, Control Techniques Americas, LLC, following a grant of summary judgment. For the reasons that follow, we affirm.

¶2 Watertronics manufactures and packages pumping systems for municipal, agricultural, golf, and landscape irrigation markets. Control Techniques, meanwhile, manufactures motor control drives, referred to as variable frequency drives (VFDs), which regulate the motor speed of the pumping systems.

¶3 From 2005 to 2007, Watertronics purchased VFDs from Control Techniques and its predecessor Safronics. Safronics/Control Techniques warranted that the drives would be free of defects in materials and workmanship and agreed to repair/replace defective products. The warranty disclaimed other remedies.

¶4 Watertronics allegedly experienced some forty-one customer field failures of VFDs sold by Safronics/Control Techniques. Each of the forty-one VFDs was allegedly returned to Safronics/Control Techniques for evaluation, repair, and/or replacement.

¶5 In 2009, Control Techniques filed an action against Watertronics seeking recovery of costs associated with the former's evaluation, repair, and/or replacement of VFDs that were returned but found not to be covered under warranty. Watertronics filed a counterclaim, alleging that it sustained damages as a result of Safronics/Control Techniques' breach of warranty. The parties eventually agreed to dismiss the matter without prejudice.

¶6 In 2011, Watertronics filed the current action against Control Techniques, alleging that each of the nonconforming VFDs breached the applicable Safronics/Control Techniques warranty. Watertronics sought damages related to replacing the drives and lost business opportunities.

¶7 During discovery, Control Techniques deposed Watertronics' president Richard Reinders. Reinders had been designated by Watertronics as the person most knowledgeable about its claims. One of the primary areas of inquiry was whether Watertronics possessed any evidence that Safronics and/or Control Techniques had failed to provide one of the limited and exclusive contract remedies for the allegedly nonconforming VFDs. Reinders did not produce such evidence.

¶8 Control Techniques subsequently moved for summary judgment on the ground that Watertronics could not produce evidence supporting a required element of its breach of warranty claim, *i.e.*, that Watertronics had not received one of the limited and exclusive contract remedies for the allegedly nonconforming VFDs. In response, Watertronics submitted an affidavit of Reinders, who asserted that where VFDs were repaired or replaced (which he did not identify), the repair or replacement took longer than three to six months, which caused the remedy to "fail of its essential purpose." *See* WIS. STAT. § 402.719(2) (2011-12)¹ (providing that where circumstances cause a limited or exclusive remedy to fail of its essential purpose, remedy may be had as provided in chs. 401 to 411).

¶9 Following a hearing on the matter, the circuit court granted Control Techniques' motion for summary judgment. The court concluded that Watertronics had failed to present any evidence establishing that it did not receive one of the limited and exclusive contract remedies for the allegedly nonconforming VFDs.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

¶10 With respect to Watertronics' newly asserted claim that the remedies failed of their essential purpose, the court questioned whether Watertronics should be allowed to raise the claim when it had not pled it. However, the court ultimately concluded that it did not matter, as Watertronics could not identify a single VFD that was repaired or replaced on a given date and could not document the time it took to obtain the repair or replacement.

¶11 The circuit court then entered judgment in favor of Control Techniques. This appeal follows.

¶12 We review a grant of summary judgment using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314–15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶13 On appeal, Watertronics contends that the circuit court erred in granting summary judgment against it. Its primary complaint is that the circuit court wrongly imposed Control Techniques' burden of proof on Watertronics when deciding whether the action could go forward. We disagree with Watertronics that the court improperly shifted the burden.

¶14 Where a party asks a court to award damages for breach of warranty, the burden of proof is on that party to show the warranty and breach thereof. *See, e.g., Dittman v. Nagel*, 43 Wis. 2d 155, 165, 168 N.W.2d 190 (1969). Accordingly, it was Watertronics' burden to establish that it did not receive one of the limited and exclusive contract remedies for the allegedly nonconforming VFDs. Because Watertronics failed to produce any evidence of that, it failed to

show a genuine issue of material fact in dispute, thereby allowing the granting of summary judgment.

¶15 As for Watertronics’ argument that the limited and exclusive remedies came too late and, therefore, failed of their essential purpose, we are satisfied that the circuit court properly rejected it. A buyer makes a prima facie case for failure of essential purpose when it produces evidence that the seller failed or refused to effect repairs within a reasonable time. *See Midwhey Powder Co. v. Clayton Indus.*, 157 Wis. 2d 585, 593-94, 460 N.W.2d 426 (Ct. App. 1990). Here, Watertronics did not make such a case, as it could not identify a single VFD that was repaired or replaced on a given date and could not document the time it took to obtain the repair or replacement.

¶16 For these reasons, we affirm the judgment.²

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

² To the extent we have not addressed an argument raised by Watertronics on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

